Supreme Court of the United States

OCTOBER TERM, 1958

No. 339

JEROME S. SFEVACK,

Petitioner,

VS.

LEWIS L. STRAUSS, *et al.*,

Respondents.

PETITIONER'S REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

1. The brief for Respondents studiously avoids any attempt to meet the issues raised by this case. It carefully refrains from challenging the "Questions Presented", which are set forth in the Petition for Certiorari and the Briefs of the Amici Curiae herein. It does not challenge the validity or the force of any of the "Reasons for Granting the Writ," set forth by Petitioner (6 reasons) and the Amici Curiae (5 reasons). It therefore in effect admits that Certiorari should be granted.

Respondents' opposition attempts to confuse and conceal the issues by dissemblance, inaccurate and misleading statements, and non-sequiturs. Petitioner feels certain, however, that the Court will not be misled by

such obvious tactics. Petitioner's remarks herein are set forth as though they were marginal notes on said brief. Paragraph numbers are merely for purposes of reference.

2. *Re Page 2:* In Respondents' "Questions Presented" and elsewhere in their Brief, the Convention is obviously referred to so as to imply that it *limits* the period for filing foreign applications. This is not the fact. It puts no time limit on such filings where there has been no publication effective in the country concerned. The convention does, in effect, allow *backdating* of applications in other convention countries to the date of the first application in any convention country, if filed within one year of such first application. This is of value *if there has been* a publication or an adverse filing within that year. But the inventor's right to file continues indefinitely until there has been a publication effective in the country concerned. Thus, Respondents' statement is disingenuous, tends to foster false inferences, and has nothing to do with the question of whether on legal, as well as on contractual and moral grounds, Respondents have any right or authority to publish information received in confidence from Petitioner, and from the Patent Office, without his consent, and contrary to the Constitution and the criminal and civil statutes.

3. *Re Page 2:* If, as Respondents state in their "Questions Presented", the Petitioner's process forms only a "small part" of what they want to disseminate, and there is a public interest in the dissemination of information with regard to heavy water technology, all they need to do is to delete "the small part" before dissemination of the bulk of the matrial. If they have "commingled" Petitioner's proprietary information

with material which they have a right to disseminate, they are free to reverse that action and have had ample time to do so, and cannot rely on their own wrong doing to deprive Petitioner of either his statutory, equitable, moral, or contractual rights to his private property. Obviously they specifically want to publish "the small part", *i.e.* this Petitioner's invention. Respondents were well aware of the private property rights involved here. They should have taken necessary precautions and safeguards to protect this information. Thus, their present difficulties, if such exist, were brought upon themselves.

4. *Re Pages 6-7:* The allegation in Respondents' "Statement" of the case of a change of mind of Petitioner and the allegation that he "planned to describe the entire processes" at Amsterdam, are gratuitous, not supported by the record, and are false. Obviously Petitioner had no intention of publishing the details of his new process and thereby destroying valuable rights therein. The summary of his proposed address, published as No. 60 on pages 67-68 in the "Programme of the International Symposium on Isotope Separation, Amsterdam, 23-27 April 1957", evidences the contrary, and clearly indicates that it was to deal only with the principles and features involved in Petitioner's earlier invention which was also secret at that time (Pet. Cert. pp. 14-15) and not with the new process for applying them. In addition such matters are irrelevant in that if the Petitioner had desired, and had been foolish enough, to disclose his process publicly to his detriment, that was his privilege after the secrecy order was rescinded.

5. *Re Pages 6-7:* The fact that Petitioner sought amicable arrangements principally on this basis of

moral and equitable principles as set forth in the counter "Statement", does not in any way detract from his legal rights under the Constitution, and the criminal and civil statutes. He was obliged to resort to the Courts when he could not obtain any firm assurance of cooperation from Respondents. The actual events show how utterly and completely his pleas, which commenced on Feb. 1, 1957, were ignored.

6. *Re Page 7:* Section 141 of the Act is obviously cited in the counter "Statement" in an attempt to plant a false inference that information relating to *"atomic energy"* embraces information concerning Petitioner's "new process" for producing heavy water. But the term "atomic energy" as defined in Sec. 11, c. of the Act (Pet. Cert., p. 2a) means *"forms of energy released in the course of nuclear fission or nuclear transformation"*. Heavy water, like concrete or carbon or steel, may be used as a material of construction in a plant for producing atomic energy or special nuclear material, irrespective of the process by which the heavy water was separated. But Petitioner's invention is not heavy water and is therefore further removed. It is only a more economical process for producing it and itself has nothing to do with nuclear fission or transformation. The "smoke screen" character of Respondents' comment is thus evident.

7. *Re Pages 7-8:* The basic theory of Petitioner's complaint is not rested on the loss of rights under the Convention, as alleged in the counter "Statement". That loss was irrevokably consummated. The theory of the complaint is to protect the still existing rights in his new process, guaranteed to him by the Constitution, and the criminal and civil statutes. Petitioner has continuously urged (and still does) that **Respondents**

have no right to publish the details of Petitioner's Process. Paragraph 12 of the Complaint (R. 4) reads in part: "Defendants having received confidential disclosure of the subject matter of the said application have no right to publish the same or any reports dealing with such confidentially disclosed subject matter".

8. *Re Page 10:* Respondents' extrapolation in their counter "Statement" from the decision of the Court below, (*i.e.* ". . . whether or not the process was owned by the United States") while inaccurate, does point out that the Court below completely failed to distinguish between property of the United States and property of a private citizen. In so doing, the Respondents actually support the need for *Certiorari* in this case.

9. *Re Page 11:* The status of Petitioner's foreign patent applications has nothing to do with the issues presented in this case. Whether or not Petitioner files patent applications does not relieve the Respondents from their obligations to comply with the laws of this country protecting his private property from destruction through breach of confidence. The extent of what Petitioner has done in his business, and no business of the Respondents, in the present posture of this case. Petitioner has a right to proceed *with all due deliberate speed* in determining where and when to file his foreign applications consistent with prudence and his means, which ability obviously has been adversely affected by the Respondents' attitude and the necessity and expense of prosecuting this litigation.

10. *Re Pages 11-12:* Petitioner is under no duty to Respondents to expedite issuance of his U. S. Patent at the possible sacrifice of unsecured rights at home or

abroad. To avail oneself of the periods provided by statute is perfectly proper. The Respondents obviously hope that issuance of Petitioner's U. S. patent would result in ousting this Court of jurisdiction, and thereby avoid an adverse decision so that they could continue to invade private property rights, as here, irrespective of the law. We trust that this unconscionable hope will not be realized in fact.

11. *Re Page 12:* Respondents depart completely from the record to assert in their counter "Statement" that 40 documents (out of 1000 examined) contain Petitioner's proprietary information in varying amounts commingled with information belonging to the United States. Again, deletion before dissemination has been and is available under the orders now in force. The comment in para. 3, above, applies.

Also, Respondents depart completely from the record to assert that access to plants "had been opened" and "had to be denied again". There is no statement that any of the public actually obtained such access. The statement is thus completely irrelevant, as well as unsupported in the record.

12. *Re Pages 12-13:* Respondents either exaggerate the effect of the restraint on them, or have misrepresented the importance of Petitioner's new process. (See "small part" comment, para. 3, above). **The restraining order** (Pet. Cert., Appendix F, p. 19a) **does not go to the "entire field of heavy water production", only to Petitioner's new process.** But evidently this improved process, this "small part" is like the heart of a man; without it the entire body is useless. Again, Respondents have brought whatever difficulties they have, if any, upon themselves.

13. *Re Pages 13-14:* In Respondents' Argument, the opening statement attempts to confuse by presenting only part of the contentions of Petitioner and the *amici curiae,* in twisted form cf. Petition and Briefs Amicus. Respondents then take refuge in the assertion that they do not seek to publish Petitioner's invention "as such". This statement is contrary to the stipulation of record that, "unless otherwise ordered by the Court, [they] intend to take the action sought to be enjoined by this suit" (R. 128, para. 3) and is vitiated by the next sentence of Respondents' argument. Also, Respondents' statement is inaccurate and incomplete. In addition to Petitioner's special confidential report in October 1949, Respondents received a confidential disclosure of the invention on August 8, 1949, and were supplied with a copy of Petitioner's patent application by the U. S. Patent Office on October 23, 1950 (R. 2; Complaint, paras. 4, 5; Pet. Cert., pp. 15-16). The rest of the opening argument is pure arrogance. As noted in connection with para. 2 above, the Convention period is misapposed and has nothing to do with the matter. Furthermore, the Secrecy Order was in effect for *six and one third years* (Sept. 29, 1950-February 1, 1957). On a "compensation for the filing period denied Petitioner" basis, urged by Respondents, if such were proper, they should be restrained for an equal 6⅓ year period, if necessary.

14. *Re Pages 14-15:* Respondents Argument I (introduction) merely reiterates arguments (public interest, interference, etc.) made in their counter "Statement" of the case. The "small part" comment in para. 3, above. shows the lack of merit of the "commingling" contention. The comment in para. 6 above (Section 141 of the Act), shows the irrelevance of the argument based thereon.

15. *Re Pages 15-16:* Respondents' sub-argument 1, on equity jurisprudence, is totally irrelevant to the issues presented in this case, namely the limited authority of the Respondents, and the Constitutional, criminal and civil guarantees protecting private property. (See also the "small part"—commingling—decommingling comment in para. 3 above). Apparently Respondents regard the public interest to be synonymous with their own royalistic desires on a *"The King can do no wrong"* basis. Respondents' arguments here that Petitioner is not entitled to equitable relief, and the subsequent argument on page 20 of Respondents' brief that the Court should never reach the question of Respondents' authority to release the information in question is an example of "placing the cart before the horse". Fundamentally, the Court must first determine whether Respondents *have* the authority in question before it can be determined whether Petitioner is entitled to equitable relief. If there ever was a case where equitable relief should be granted, this is the case.

16. *Re Page 15* (as well as on pages 2, 16 and 18), Respondents speak of the "public interest" which they contend justifies or warrants their action. They use the phrase but they never have explained or outlined *what public interest* is being served. Certainly there is no public interest in allowing Respondents to run rough-shod over Petitioner as they here intended to do, and to give away information they do not own to his irreparable damage. Furthermore, there is great expressed public interest in the scientific community of the nation in favor of protecting scientists and inventors in Petitioner's position. This **public interest** does not lie in the subject matter of Petitioner's patent application as Respondents wish to have the Court be-

lieve, but rather it **is an enraged and indignant public cry from the nation's scientists and engineers against the unauthorized, unconstitutional and undemocratic activities of the Respondents.**

Respondents have ignored and failed to refute or contest the asserted public interest of 330,000 of the nation's scientists and engineers as represented by the *amici curiae,* and of the reactions of the press (Pet. Cert., pp. 24, 26, 27).

17. *Re Page 16:* Respondents' sub-argument 2, on non-classified atomic energy data, is irrelevant. Petitioner's information was confidentially disclosed to Respondents, and should remain classified as "confidential" in their hands. Furthermore, it does not relate to "atomic energy" (see discussion para. 6, above). Thus the "Congressional finding" is not pertinent to this case.

18. *Re Pages 16-17:* Respondents' sub-argument (a) on sufficiency of relief rests on completely false premfiling ises. The ~~finding~~ period denied by the Secrecy Order was 6⅓ years (see comment in para. 13, above). The loss of the Convention period, which expired Sept. 29, 1951, can never be compensated by time (see comment in para. 2, above). The attempt at amicable settlement, etc., has no relevance (see comments in paras. 5, and 10, above). The gratuitous statement that Petitioner seeks to be placed in the same position as though the secrecy order had not issued is patently false. Such is impossible. The "Twelve months (and no more)" statement is completely false (see comment in para. 2, above), and the "nine months more" statement is therefore obviously false (id.). The balance of the argument is void and rested on false premises and non sequiturs.

19. *Re Pages 18-19:* Respondents' sub-argument (b), that Petitioner should forego statutory rights, clearly has no merit (see comment in para. 10, above). No one forfeits anything by availing himself of his statutory rights.

20. *Re Pages 19-20:* Respondents' sub-argument (c), attempting to justify a breach of confidence, resorts to half truths. Petitioner's invention was confided to the Atomic Energy Commission for use in the production of heavy water for the United States subject to appropriate compensation in due course, not for publication and destruction of his proprietary rights therein. Certainly if Respondents had any evidence to support this contention they would have presented it to the Court long before this. Petitioner's contract reservations apply to any rights in his invention, not only for the compensable use thereof in production. Legal and constitutional rights are here involved, not equity alone. Petitioner does not seek specific relief against incorporation of his invention and use of it in productions by or for the United States, only against unauthorized publication of it. An invention is unique, it is not a common beam, and *Gaius* would certainly be amused at the misapplication of his commentary. Thus there is no substance whatsoever in this argument.

21. *Re Page 20:* Respondents' argument II, introduction, is mere wishful thinking, which needs no comment.

22. *Re Pages 20-22:* Respondents' sub-argument 1, on unclassified atomic energy data, is founded on an erroneous premise (see comment re "atomic energy" in para. 6, above). Thus Respondents' alleged question is the "straw man". Respondents admit that (1)

unclassified information (2) relating to "atomic energy" and (3) belonging to the United States, constitutes the *limits of the express authority* conferred by Congress. Commingling gives no greater right (see comment in paras. 3 and 12, above). Respondents' argument blows hot and cold at the same time and again departs from the record, cf. "small proportion" v. "inseparable". There is no evidence in the record to support the "inseparableness" alleged (see also comment in para. 12, above). Confidential disclosure for *use in production* by the Government subject to compensation gives no right to *publish*. Respondents' argument is therefore without merit.

23. *Re Pages 22-24:* Respondents' sub-argument 2 in effect says to this Court, "Do not adjudicate Petitioner's constitutional rights. Just let us do what we want to, and *later* decide whether Congress really authorized us to do it to determine whether the Petitioner will be compensated for the destruction of his property". The logic is that of a willful child. As to footnote 17 (*page 23*), see footnote 3, at page 19 of the Petition for Certiorari in No. 641, Oct. Term 1957, which reads:

> [3] Ex Parte Fulmer ruled with respect to the Atomic Energy Act of 1946 ". . . we find nothing in the (Atomic Energy) Act which would justify consideration of a claim for damages based upon publication of a disclosure made to the Commission." No provision for such compensation was added in the amended Act of 1954.

The cases cited by Respondents, of course, have no relevancy to the situation here presented. In none of them was constitutionality or lack of statutory authority in issue. Also see Briefs of American Chemical Society and of the Engineers Joint Council, as *amici curiae*. As regards the distinctions between this case

and the *Larson* case we incorporate by reference Appendix G (21a-25a) of Petition for Certiorari in No. 641, October Term, 1957.

Page 24, Footnote 18 is completely answered at pages 38-41 of the Petition for Certiorari herein.

The Brief for Respondents fails to even deny, much less attempt to refute, the Petitioner's sixth reason for granting the writ which is related to the pending Petition for Discovery in this case.

CONCLUSION

As above shown, the Respondents in this case have really made no effort to show why a petition for certiorari should not be granted. What their brief actually does, in effect, is (1) to assume it will be granted, and (2) to present arguments attempting to persuade this Court to affirm the result below on some ground that will not rule upon Respondents' authority. As such, Respondents brief is actually a brief on the merits, and is as weak and unsupportable as is their position. In this connection, the Petition for Certiorari is equally complete, and in our view shows not only compelling grounds for granting the writ, but also compelling reasons for reversing the Courts below.

Under the circumstances we submit that the issuance of a writ is clearly warranted, and that this Court, if it considers the merits fully argued, will be justified in reviewing the case on certiorari, and in rendering its decision, without further hearings or briefs, as it did in No. 641, October Term, 1957.

Respectfully submitted,

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